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## ONE PHASE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

NO clause of the Federal Constitution, making a grant of power, has, by judicial interpretation, been declared so broad and comprehensive in its scope as that clause which empowers Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes."

In one of the very first cases in which the Supreme Court was called upon to consider the scope of this provision, it was quite properly held that under it, navigation was one of the important subjects which came within the federal power. Under it navigation was not only an important subject considered by the framers of the Constitution, as included within the scope and purpose of the provision, but there can be no doubt that under a reasonable rule of construction, it was properly held to be included therein. Some of the earlier decisions seem to indicate a disposition upon the part of the Court to give the clause a more liberal construction than would seem to be justified. As an illustration thereof, in *United States v. Coombs*,<sup>1</sup> it was held that Congress might provide for the punishment of a theft of property which consisted of a part of the outfit of a wrecked ship, even though the property which had been stolen was removed from the ship, was on land when stolen, and the ship from which it was removed to the land was stranded above high tide.

Later on, in *Edye v. Robertson*,<sup>2</sup> a regulation of immigration was sustained. The bridging of navigable streams was declared lawful in *Newport Bridge Co. v. United States*,<sup>3</sup> even though it otherwise would be a nuisance, and in a well-known case, it was held that it sustained the right of the Federal Government to close up one of the navigable channels of a river and divert the water naturally flowing therein to another channel and thus deprive the riparian owner of the use thereof.<sup>4</sup>

*Gibbons v. Ogden* was the first important case which came up, wherein was discussed at great length, both by counsel and court,

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<sup>1</sup> *United States v. Coombs*, 12 Pet. 72.

<sup>2</sup> *Edye v. Robertson*, 112 U. S. 580.

<sup>3</sup> *Newport Bridge Co. v. United States*, 115 U. S. 470.

<sup>4</sup> *South Carolina v. Georgia*, 93 U. S. 4.

this clause of the Constitution, and in the decision written by Chief Justice MARSHALL, two important rules were laid down which have been consistently adhered to ever since.<sup>1</sup>

Briefly stated, these rules are: (a.) That the grant of authority made by the Commerce Clause, gave to the Federal Government, when it chose to exercise the same, the exclusive control of the navigable waters of the United States, so far as the use of the same for the purpose of interstate commerce is concerned, which necessarily included the power to regulate the navigation therein.

(b.) That the power to regulate navigation was exclusive in the Federal Government when it chose to exercise the same, and when the Federal Government had legislated on the subject no residuum of power over the subject remained in the respective states.

While in *Gilman v. Philadelphia*,<sup>2</sup> and *Willson v. Black Bird Creek Marsh Company*,<sup>3</sup> which arose later, it was held that legislative authority from the state legalized the construction and maintenance of bridges over navigable streams even though the bridges were permanent obstructions to navigation, yet the legislation of the state in each instance was sustained because there had been no Federal action over the subject matter thereof with which the state legislation came in conflict, and in the absence of such legislation the state might authorize the obstruction mentioned.

The doctrine of the two last named cases has been several times declared in later cases, with the result that we have a settled principle of constitutional law, that in the absence of Federal action the respective states may authorize improvements, changes, and obstructions, whatever their character may be, in navigable streams even though they may be subsequently declared by Congress to be unlawful, and the Federal Government may cause their removal and destruction.

The rule laid down as to the control by the Federal Government of navigable waters, was applied later on by the Supreme Court to many different and distinct subjects of controversy, and it was held that under the control that this clause conferred, it was empowered to improve the navigability of the waters by deepening and closing channels, making and enforcing regulations for keeping them open

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<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>2</sup> 3 Wall. 713.

<sup>3</sup> 2 Peters 246.

and in safe condition, in the construction of light-houses, jetties, gates, and the opening of new and deeper channels for navigation, and that in the exercise of power to improve the navigation of streams the Federal Government was free from many of the limitations which would seem at first glance to be necessary for the protection of private property and the private rights of individuals; thus in *Gilman v. Philadelphia*, *supra*, the construction of a bridge under such authority, across a navigable stream was sustained, even though the same closed the river for navigation above the bridge and did consequentially render practically valueless, docks and wharves which had theretofore been of great value and which had been used in commerce and navigation and situated above the bridge. And in *Georgia v. South Carolina*, *supra*, the diversion of the entire stream from one channel into another, thus depriving the riparian owner on the closed channel of the use thereof for navigation, was warranted under the exercise of this power.

In no other respect has the power of the Federal Government under this clause been more frequently judicially considered and defined than that phase of it which pertains to the control of navigation and navigable waters. The judicial history of the clause may be said to commence with *Gibbons v. Ogden*, *supra*, in 1827, and to have continued down to *Scranton v. Wheeler*,<sup>1</sup> and is to be traced through a series of decisions which from time to time declare in a progressive manner, the various ramifications of the great power conferred by this clause.

It is in *Gibbons v. Ogden* we find it declared that no state could grant a monopoly of the right of navigation by steam power, of any portion of the navigable waters of the state which were subject to use for interstate commerce, because Congress, having provided for licensing all vessels in the coasting trade, it had legislated on the subject, and the state legislation being in conflict therewith, was invalid, and that over the subject the power of the Federal Government was exclusive; and in *Scranton v. Wheeler*, *supra*, the court, by a majority opinion, reached the conclusion that by virtue of its control of the navigable waters, the Federal Government might take possession of the bed of a stream where the water was too shallow for navigation, excavate a navigable channel through the same, mark the lateral lines

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<sup>1</sup> *Scranton v. Wheeler*, 179 U. S. 141.

thereof by permanent piers extending above the surface of the water, and of great length, and prevent the owner of the upland from enjoying his common law right of access to navigable water, even though by the law of the state he owned in fee the bed of the stream, and it could do all this without making him any recompense, although the effect of it might be to entirely destroy the value of his property.

In the first case mentioned the property right attacked was one created by a legislative grant of the right to the exclusive use of certain navigable waters; while in the second, the clause was held to empower the Federal Government to utterly destroy the common law right of access of the riparian owner, if it were deemed proper to do so, for the purpose of improving the navigability of the stream for the greater convenience of the public engaged in interstate commerce.

The first case denied a right claimed to the use of a navigable water to the exclusion of the public, which operated to destroy the right of common public navigation; while the second held that the common public right of navigation was so paramount to the private individual right of access to navigable water that the Federal Government under the old clause, could for the purpose of improving the stream for public navigation, take away the right of access of the individual without any compensation.

It would be interesting and instructive to trace the application by the Federal Courts of the doctrine in *Gibbons v. Ogden*, in the numerous cases which have arisen since its decision and which call for its application, but as our purpose is to confine ourselves for the present to the consideration of the doctrine in *Scranton v. Wheeler*, which is not a legal sequence of *Gibbons v. Ogden*, we will make but a brief reference thereto.

*Scranton v. Wheeler* may be said to belong to that class of cases which consider the power of the Federal Government to take physical possession, so to speak, of a navigable water, and to interfere with the right of navigation by the construction of bridges and like public works, and in exercise of the power to improve the navigability of the stream, to interfere with the private rights of riparian owners and this article is intended as a brief presentation of what the court in that case has declared to be the effect of the Commerce clause of the Constitution on the property rights of riparian owners on the navigable rivers and inland

waters, more especially the rights of the riparian proprietor in the ownership of the submerged land, and of the more valuable property right of access to the navigable water from his land, and from the water to the upland.

Riparian proprietors, as such, have certain rights pertaining to navigable waters and growing out of their ownership of the land adjoining such navigable waters, not possessed and enjoyed by the general public, and wholly distinct from the common public right of navigation. The right of navigation, so-called, is of course possessed by all riparian proprietors, but it is not so possessed by the riparian owner by virtue of his possession or ownership of land bordering upon the stream, or the land constituting the bed of the stream. It is a right which he possesses as one of the general public, and to be enjoyed in common with, and not to the exclusion of, the general public.

There are, as has been stated, other rights of an exclusive nature, possessed by the riparian owner, not enjoyed by the general public, but which are wholly private in their character, and partaking of the nature of property rights. The common right of navigation is not a property right in the sense that it is one that can be bought or sold, or severed from the public general ownership. It is incapable of exclusive enjoyment and possession, and must be exercised with due regard for the rights of all the rest of the public desiring to navigate the stream or other navigable water. It is a right wholly subordinate to the general power of the state or of the Federal Government to control, or qualify, or limit, according as the state or the Federal Government may deem best for the interests of the public.

There are, however, as suggested, two rights of a property character possessed by a riparian owner, which are wholly distinct from the public right above described. They are of wholly different character and origin. These rights are:—

(a.) A right of private ownership in the submerged land in the bed of the navigable stream, and extending to the middle file of the stream, and which, under the law of Michigan, and other states, devolves by operation of the law, upon the owner of the upland. That is to say, the owner of the land bordering upon the stream succeeds by operation of law, to the title in fee to that portion of the bed of the stream in front of his upland between lateral lines drawn

at right angles to the general course or middle file of the stream.

(b.) The property right of access from the land to the navigable water, and the right of access to the upland from the water. This right attaches to, and is a feature or necessary part of, the enjoyment of the upland. It is of a character and extent different from, and not dependent on, the ownership of the submerged land, and has heretofore been universally held to be a property right of which the owner could not be deprived without due process of law and due compensation.

As *Scranton v. Wheeler* discusses the nature of this interest, and in both the prevailing and dissenting opinions the character and extent thereof are discussed, and as in reality the case turns upon the consideration of the nature of these interests, and the effect of the constitutional provision referred to thereon, we will confine this article to that subject.

It is sufficient to say, with reference to the title of the riparian owner to the submerged land that in *Ryan v. Brown*<sup>1</sup> the Michigan Supreme Court had under consideration the character and extent of the interest possessed by the riparian owner in the submerged land. The facts in the case appear to have been that Ryan owned a lot on the St. Mary's river upon which he had a dock which extended to navigable water. It was adjacent to the foot of the canal or lock at St. Mary's Falls, and the state, desiring to extend the southerly pier of the canal, took possession of the submerged land in front of Ryan's lot and proceeded to remove certain cribs which he had constructed there for the purposes of constructing the pier, without making any compensation to Ryan, and the question was as to the right of the state, (which in this instance possessed equally extensive powers as does the Federal Government) to take possession of this submerged land and interfere with the use of the docks of Ryan for the purpose of improving the navigability of the stream. After discussing the fact at some length, the court proceeds to state in an opinion written by Justice CAMPBELL that

"The state has no more right to interfere with private property without compensation, to make or improve a canal, than it has for a road upon land. And if the canal entrance is desired to be made wider, and the widening is over private property, which in the absence of the canal could have been kept improved without any impropriety, the state may unquestionably have it con-

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<sup>1</sup> *Ryan v. Brown*, 18 Mich. 211.

demned by some process of law provided for the purpose, or make purchase of the property, but it cannot be taken arbitrarily. It is as much the owner's freehold, as if it were upland."

This decision was in direct affirmation of prior decisions of the court in *Lorman v. Benson* and *Rice v. Ruddiman*,<sup>1</sup> holding that the title to the bed of the navigable stream to the middle file thereof, is in the riparian owner, and that the complete control of the use of such land covered with water is in the riparian owner except as it is limited and qualified by such rights as belong to the public at large, to the navigation and such other use, if any, as appertains to the public generally, over the water.

While in *Scranton v. Wheeler*, which arose at the same canal, the majority opinion proceeds to discuss and consider the nature and extent of the property interests of the riparian owner in the bed of the stream and to practically overrule *Ryan v. Brown*, in holding that the state or Federal Government might take possession of the submerged land and construct permanent piers and public works thereon without compensation to the private owner, yet it would seem that the suggestion made in the minority opinion, that that question was not before the court, was sound, because, as it pointed out, under the deeds by which the upland was held by Scranton it would appear as though his title was by the grants limited to the land to the edge of the water, nevertheless the minority proceeds, however, to vigorously combat the idea that if Scranton did own to the center of the stream, his title thereto was subject to the qualification which the majority opinion attaches thereto.

The right of access, however, must be considered as of very much greater importance in its private property character, than the title which a riparian owner has in the bed of the stream. Its existence does not depend upon the ownership of the submerged soil, but is attached to the ownership of the upland, and its possession and use is a part of his enjoyment of the upland. To a clear understanding of the nature and extent of this property interest, and of the effect of the constitutional provision in question thereon, as declared by the Federal Supreme Court, it is proper that we should examine some of the English and American decisions with reference thereto.

Perhaps the best exposition of the common law as it prevails

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<sup>1</sup> *Lorman v. Benson*, 8 Mich. 18; *Rice v. Ruddiman*, 10 Mich. 125.



in England is to be found in *Lyon v. Fishmonger's Co.*<sup>1</sup> The court there had under consideration the extent and nature of the property right of access to navigable water which belonged to the riparian owner. By Act of Parliament, known as The Thames Conservancy Act, the Conservators were given control for public purposes of improvements to be made by riparian owners in the Thames, and were empowered to grant licenses to such owners to construct piers in front of their property, and to define the character and size thereof. In the exercise of that power, the Conservators granted to the Fishmonger's Company power to make an embankment in front of their wharf to the main line of the river, which would have the effect of cutting off Lyon's access from a certain portion of his frontage to navigable water. Thereupon Lyon filed his bill in equity against the Conservators and the Fishmonger's Company to restrain them from constructing the works or doing anything whereby his right of access to the river might be defeated or prejudiced or which would interfere with his right of access.

By the terms of the Conservancy Act it was specifically provided that the powers conferred upon the Conservators by the Act should not authorize them to take away, alter or abridge any right which any owner or occupier of lands upon the banks of the river, were then by law entitled to, but the same were to remain in full force and effect, and the questions presented were (1) as to the nature and extent of the property right of access; (2) as to whether the Act of Parliament subjected this property right of access to the qualification that the Conservators might, in the interests of navigation and commerce, interfere therewith without compensation.

It should be noted that the reservation above referred to in the Conservancy Act, saving the rights of riparian owners is no broader, nor in a legal sense can it be said to be as broad, as the provision of the Fifth Amendment to the Federal Constitution which prohibits the taking of private property for public purposes except by due process of law and after due compensation. That this provision prohibiting the taking of private property without due process of law and without due compensation, affects and qualifies the Commerce Clause of the Constitution and is a limitation upon the power of Congress in the exercise of the jurisdiction conferred by

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<sup>1</sup> *Lyon v. Fishmonger's Company*, L. R. 1 App. Cas. 662.

that clause, is clearly decided in *Monongahela Navigation Company v. United States*, decided by the Supreme Court.<sup>1</sup> In that case the question was as to the right of the United States Government to take private property without compensation in the improvement of the navigability of a stream. Speaking upon this question the court said:—

“Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce. This is one of the great powers of the National Government, one whose existence and far-reaching extent have been confirmed again and again by this court in its legal opinions and the power of Congress over interstate highways and navigable streams is confessedly supreme.”

Continuing, the court states:—

“But like other powers granted to Congress by the Constitution, the power of regulating commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that control it deems it necessary to take private property, then it must proceed subject to limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon a price with the owner, or in condemnation pay just compensation therefore. And if that property be improved under authority of a charter granted by the state with a franchise to take tolls for the use of the improvement, in order to determine such compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him before it can be said that just compensation for the property has been made. And that which is true in respect to condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal, with locks in order to pass around rapids or falls. Of the power of Congress to condemn whatever land that may be necessary for such canal, there can be no question; but of the equal necessity of paying full compensation for all private property taken, there can be as little doubt.”

So we thus have what appears to be a limitation upon the power of Congress under the Commerce Clause at least equal to that which was imposed upon the Thames Conservators by the Act of Parliament.

Lord Cairns delivered the principal opinion in *Lyon v. Fish-*

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<sup>1</sup> *Monongahela Nav. Co. v. United States*, 148 U. S. 312.

*monger's Company*, and clearly and distinctly held that the riparian owner's right of access to navigable water is a property right attached to and part of the enjoyment of the upland of which he is the owner, and that any interference with or disturbance thereof, might be vindicated in an action for damages or restrained by injunction, and he therefore held that the Act of Parliament referred to did not authorize the Conservators to interfere with or disturb the same, and that it was a private property right which could not be destroyed without due compensation. In the decision reference was made to the earlier case of *Rose v. Groves*, in which the court distinctly asserted and protected the private property right of the owner of the upland of access to navigable water.<sup>1</sup> The same rule was recognized by the House of Lords in *Bell v. Corporation of Quebec*,<sup>2</sup> and also in *Duke of Buccleuch v. Metropolitan Board of Works*.<sup>3</sup>

It is safe to say that it is the settled common law of England, as declared in these decisions, and that it clearly recognized as valuable property of a private character, the right of the riparian owner to free, uninterrupted access to and from the navigable water in front thereof.

It is to be further noted that in *Bell v. Corporation of Quebec*, the House of Lords in their opinion also recognized that the same property right exists and is protected under the French law. It further is clearly shown by these decisions that this is a property right of the character that cannot be taken away without due compensation.

Now let us see what the American courts, State and Federal, prior to the decision in *Scranton v. Wheeler*, decided as to the nature and extent of this property right, and the protection to which it is entitled.

The Supreme Court of Wisconsin, in *Delaplaine v. Chicago & Northwestern R. Co.*,<sup>4</sup> had occasion to consider this subject, and in clear language declares that the proprietor of the adjoining upland, and as connected with it, has an exclusive right of access from his land to the navigable water at that particular place, and that as inci-

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<sup>1</sup> *Rose v. Groves*, 5 Man. & G. 613.

<sup>2</sup> *Bell v. Corp. of Quebec*, L. R. 5 App. Cas. 84.

<sup>3</sup> *Duke Buccleuch v. Metrop. Bd. of Works*, L. R. 5, H. L. 418.

<sup>4</sup> *Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 214.

dent to that, has a right to build piers, wharves, etc., in front of his land; that these are private rights incident to the ownership of the shore which he possesses distinct from the rest of the public. The court, at considerable length, and with distinctness, approved the language of the learned judges who delivered opinions in *Lyon v. Fishmonger's Company*, above referred to.

In the later case of *Diedrich v. Northwestern Company*,<sup>1</sup> the same doctrine is reaffirmed, and reference is again made with approval to the doctrine of the *Lyon v. Fishmonger's Company* case.

The Supreme Court of Minnesota, in *Brisbine v. St. Paul & Sioux City R. Co.*,<sup>2</sup> had occasion to consider the nature and extent of the property right of access which we are discussing. It in substance, there declared that the owner of the upland had the right of free communication between his upland and the navigable channel of the river, which carried with it the right to construct wharves and landing places, and to exclusively occupy the bed of the stream necessary for that purpose, and that the rights which thus belong to the riparian owner were valuable property rights of which he could not be divested without consent, except by due process of law, and if for public purpose, upon just compensation. And in the later case of *Carli v. Stillwater St. Ry. & Transfer Co.*,<sup>3</sup> the same court had the question up for consideration, and announced the same doctrine, quoting with approval *Lyon v. Fishmonger's Co.*, *Brisbine v. St. Paul & Sioux City R. Co.*, *supra*, and *Yates v. Milwaukee*,<sup>4</sup> hereafter referred to.

The doctrine of the Wisconsin and Minnesota courts has been very generally declared by other state courts, so that it may be deemed as the settled law in this country that the property right of access which belongs to the riparian owner is one which attaches to and is a part of his enjoyment of the upland, and one of such a character that it is private in its nature, and of such a character and extent that he cannot be deprived of it without due process of law and without due compensation, where it is desired to deprive him of the same for public purposes.<sup>5</sup>

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<sup>1</sup> *Diedrich v. Northwestern Company*, 42 Wis. 248.

<sup>2</sup> *Brisbine v. St. P. & S. C. R. R. Co.*, 23 Minn. 130.

<sup>3</sup> *Carli v. Stillwater St. Ry. & Transfer Co.*, 28 Minn. 373.

<sup>4</sup> *Yates v. Milwaukee*, 10 Wall. 497.

<sup>5</sup> *Steers v. Brooklyn*, 101 N. Y. 51; *Langdon v. N. Y.*, 93 N. Y. 129.

That this has also been the recognized doctrine in the Federal Supreme Court seems quite clear from the decisions. In *Yates v. Milwaukee*, Justice MILLER, speaking for that court considered and declared the nature and extent of this property right. He in substance declared that whether the title of the owner of the upland extended beyond the dry land or not, he was entitled to the rights of a riparian proprietor whose land was bounded by a navigable stream, and that among those rights was the right of access to the navigable part of the river from the end of his lot, and to make a landing or pier for his own use, or for the use of the public. Continuing, the court used the following language:—

“This riparian right is property, and is valuable, and although it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with the established law, and if necessary that it be taken for the public good, upon due compensation.”

This declaration of the law was accepted as correct and authoritative by that Court in a number of decisions in which the court may fairly be said to have expressly affirmed the doctrine there announced.<sup>1</sup>

Nevertheless the doctrine above quoted in *Yates v. Milwaukee* is in substance repudiated by the majority opinion in *Scranton v. Wheeler*. It is there said that at most, Judge MILLER's statement of the law was a mere dictum and not necessary or appropriate to be made in the decision of the case. They further declare that Judge MILLER's decision in *Yates v. Milwaukee* was right but inappropriate reasons were given therefor. No notice, however, is taken of the later decisions of the same court in which the doctrine announced by Judge MILLER in *Yates v. Milwaukee*, is expressly approved in cases where there can be really no claim that such approval was inappropriate or mere dictum.

It may assist in the proper understanding of this question to refer to two other cases decided by the United States Supreme Court in which the origin and extent of the Federal power under the Clause are more or less considered. In *South Carolina v. Georgia*,<sup>2</sup> the court disposed of an original action brought

<sup>1</sup> *Webber v. Harbor Comm'rs.*, 18 Wall. 65; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 682; *Ill. Cent. Ry Co. v. Illinois*, 146 U. S. 445.

<sup>2</sup> *South Carolina v. Georgia*, 93 U. S. 4.

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by the State of South Carolina against the State of Georgia and certain of the Cabinet and subordinate officers of the United States, to restrain the making of certain alterations and improvements in the Savannah River, the effect of which would be to close up one of the navigable channels upon the South Carolina side of the river and divert the water to the channel on the Georgia side, thus depriving the South Carolina residents of the use of the channel on their side of the island which stood in the river. In the course of the decision, the court, through Justice STRONG, had occasion to speak of the power of the United States under the clause in question. He says:—

“That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between states, rivers that are accessible from other states, at least to the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government, it has been so understood and determined. Prior to the adoption of the Federal Constitution, the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was entirely in their power to prescribe not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to ‘regulate commerce’ conferred by the Constitution upon Congress is that which previously existed in the states. As was stated in *Gilman v. Philadelphia*, 3 Wallace 724, (70 U. S. 99), ‘Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from any state other than those in which they lie. For this purpose they are the public property of the nation subject to all the requisite legislation by Congress. This necessarily includes the power to keep these open and free from any obstruction to their navigation, interposed by the states or otherwise; and to provide such sanctions as they may deem proper against the occurrence of the evil and for the punishment of the offenders. For this purpose Congress possesses all the powers which existed in the states before the adoption of the National Constitution, and which have always existed in the Parliament of England.’ Such has uniformly been the construction given to that clause of the Constitution which confers upon Congress the power to regulate commerce.”

This case is referred to and quoted from in the majority opinion in *Scranton v. Wheeler*. In substance it is a declaration by the Supreme Court that when the present Constitution was adopted and the several states agreed thereto and became members of the Federal Union, by the Commerce Clause they surrendered to Congress in the fullest extent the control of the navigable waters of the United States capable of use for interstate commerce, and that by operation of this clause, Congress acquired in its fullest extent the power which, prior to its adoption, had been lodged in the states as colonies, and that the power which the colonies and the states possessed prior to the adoption of the present Constitution, and which was thereby passed over to Congress, was the full measure of power over the subject possessed by the Parliament of England. In this view, and in connection with this proposition, the decision of the House of Lords in *Lyon v. Fishmonger's Co.* as to the extent to which this property right of access can be destroyed without compensation, becomes of interest. We must not be understood as claiming that *Lyon v. Fishmonger's Co.* asserts that the Parliament of England could not, in the exercise of its legislative control of the navigable waters of the realm, have conferred upon the Board of Conservators, power of as plenary a character as that which the Supreme Court said in *South Carolina v. Georgia*, was possessed by Congress, but when we remember that in *Monongahela Navigation Co. v. United States* the same court has distinctly asserted that the power possessed by Congress under the Commerce Clause was qualified by and subject to the limitations contained in the Fifth Amendment, and that the private property necessary to be taken or destroyed in the exercise by Congress of its power to improve the navigability of a stream must be duly compensated for, and that in *Lyon v. Fishmonger's Co.* the power of the Board of Conservators was subject to limitations contained in the Act of Parliament of the same character and having the same purposes as the Fifth Amendment, it is somewhat difficult to reconcile these earlier declarations of our court with the statement of the law in *Scranton v. Wheeler*.

The other case worthy of consideration in this connection is *Gibson v. United States*,<sup>1</sup> in which the court considered a case that arose from the partial obstruction of the riparian owner's right of

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<sup>1</sup> *Gibson v. United States*, 166 U. S. 269.

access, and in which it was asserted that the power of Congress was of such a character that under the facts of that case, no right of action arose because of the partial obstruction.

The doctrine declared in *Scranton v. Wheeler* in substance is that, (1.) The title which the riparian owner has in the submerged land is one limited, and qualified, and subject to the public right of navigation, even though the water be not deep enough at the point in question, for practical use in commerce, and that Congress may take possession of the submerged land, and dig and remove the same for the purpose of creating a new and artificial channel. (2.) That the right of access which attaches to the ownership of the upland may be wholly destroyed and the use of the upland rendered, in a sense valueless. For instance, take an illustration familiar to all of the people in the northwestern states. In many of the coves and indentations along the lakes and rivers, extensive lumber saw-mills have been established, and the shoal water in front thereof is used by the riparian owners for the storage of their logs. Under the decision in *Scranton v. Wheeler*, such property could be rendered utterly valueless and such use entirely prevented should Congress deem it advisable to excavate an artificial channel through the shoal water, and for the purpose of protecting same from drifting sands and other obstructions, construct permanent piers along the side thereof, the effect of which would be to wholly obstruct and prevent access.

It is quite clear that the law as it now stands declared by the Supreme Court on this important question, must sooner or later receive reconsideration, and in the end be qualified and modified. It was undoubtedly the part of wisdom to confer upon Congress the power given by the Interstate Commerce Clause of the Constitution. This has been fully demonstrated by the extraordinary growth of interstate commerce upon the great rivers and lakes of the country and has been the justification and authority for those extensive improvements which Congress has made in the navigability of the rivers and lakes. The construction and maintenance of light-houses, the establishment of harbors of refuge, the deepening of channels so as to give opportunity for enlarging and improving the vessels used in commerce, the construction of piers and jetties, the adoption of laws regulating the navigation of vessels and the employment of seamen, the regulation of the equip-



ment of vessels, the inspection of boilers, and of the number of passengers and the equipment for their safety upon steam vessels, the regulation of the licensing of pilots and navigators, and all of like beneficial and highly salutary acts of legislation would be wholly impossible in their present state of completeness and efficiency were it not that the jurisdiction over them was conferred upon Congress or some department of the Federal Government. It is true that more or less criticism is justified by the manner of passage and the appropriations that are sometimes made by what are known as the River and Harbor Appropriation Bills. Foolish and extravagant expenditure of public money sometimes takes place, though it has rarely been found that in the actual expenditure of that money there has been any misappropriation by the officials in charge, or that it has not been expended with the most painstaking and scrupulous regard for honest administration. But on the whole the control of the navigable waters has been exercised by the Federal Government wisely with most beneficent and satisfactory results.

In a broad general sense, the provisions of the Constitution of the United States may be grouped into two grand subdivisions:—

(a.) Those containing grants of power to the different departments of the Government.

(b.) Those which might be called restrictive or protective provisions, by which the rights of persons and individuals are conserved, and which operate as limitations and restrictions upon the power of the government under the granting clauses.

The commerce clause of the Constitution comes within the first class. It makes a distinct grant of power, and its absence would have left the Federal Government with no jurisdiction or control over the subject matter. Provisions such as the Fifth Amendment, and those relating to personal liberty and the private rights and privileges of individuals, as well as those intended to preserve the social and political rights of citizens, constitute the second class, and have for their great purpose limitations and checks upon the exercise of the powers granted by the other clauses. It should be deemed a cardinal principle of constitutional interpretation that those grants of power, when applied to the subject of private rights, and of private property, and when in the exercise of power thereunder the government comes in contact with the rights

of individuals and rights of property, should first be measured up with those provisions of the second class, which have for their purpose the limitation of power and the conservation and protection of private rights, and, instead of a broadening and enlarging rule of interpretation being applied to the grant of power, by which many injuries are inflicted, such rule of interpretation ought to be applied to the protective and restrictive clauses. To apply this principle to the question under consideration, in my view, would mean that the doctrine of *Monongahela Navigation Company v. United States*, would be held to be one of general application, and that the grant of power in the commerce clause of the Constitution, in so far as its exercise brought the government in contact with the rights of persons and the rights of property, should be held to be qualified and limited by the Fifth Amendment. While it is true that the Federal control of commerce in those respects which pertain to its encouragement and growth has a marked and beneficent effect, and in that respect the clause may be deemed as one of the most desirable and efficient guarantees of commercial growth and progress, and as such presents a pleasing and attractive character to view; nevertheless, yet in its practical application, when it has been exercised by the government in such a way as to come in contact with private rights, it has by construction and interpretation frequently worked out grave and serious injustice.

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